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Term, 1970

No. 424

[illegible], *et al.*,

Petitioners (Applicants in Intervention),

vs.

PASADENA CITY BOARD OF EDUCATION, UNITED STATES OF AMERICA, NANCY ANNE SPANGLER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief in Opposition by Respondents Pasadena City Board of Education, Ralph W. Hornbeck, as Superintendent of Schools, Albert C. Lowe, LaVerne Lafayette, Joseph J. Engelen, Bradford C. Hosmer and Henry C. Clark, as Members of the Pasadena City Board of Education.

JOHN P. POLLOCK,
612 South Flower Street,
Suite 812,
Los Angeles, Calif. 90017,
Counsel for Respondents Pasadena City Board of Education, et al.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 625-0750

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IN THE

Supreme Court of the United States

October Term, 1970
No. 424

STANLEY ALEXANDER, *et al.*,
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This Brief in Opposition is by some, but not all, respondents. These respondents were the defendants in the trial court, the ones against whom the judgment was entered and the ones responsible for the operation of the grammar schools, intermediate schools and high schools of Pasadena, California. We understand that other respondents also will file Briefs in Opposition. We adopt and incorporate their argument and their statements to the extent that they are not inconsistent with this Brief.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict Among the Circuits.

Petitioners claim that the decision below is in conflict with *Smuck v. Hobson,* D.C. Cir., 408 F. 2d 175 (1969). Such is not the case. In *Smuck,* the District Court exercised its discretion by granting intervention to the parent group. In the instant case, the District Court, interpreting Rule 24(a) F.R.C.P. and exercising its discretion, denied intervention. In *Smuck,* therefore, the issue was whether the trial court abused its discretion in granting intervention; while here, the issues before the Court of Appeals were (1) whether petitioners could intervene as a matter of right under Rule 24(a) F.R.C.P. and (2) whether the District Court had abused its discretion under Rule 24(b) by denying intervention.

The factual circumstances in *Smuck* were unique. In *Smuck,* the parent group was permitted to intervene by the trial court for a limited purpose and under factual circumstances of a change in the composition of the school board itself. These changed circumstances, involving the replacement of an appointed school board by an elected school board, were such that the new school board in *Smuck* wanted to appeal but had come into existence too late to perfect an appeal. Such is not the case here. Here the elected School Board that energetically defended the case in the trial court, that after judgment and upon open hearing decided not to appeal, is the same elected School Board that now resists granting certiorari.

On the surface, it may seem paradoxical that these respondents, who so vigorously opposed the entry of any judgment against them, should now, with equal

vigor, oppose petitioners who seek to have that judgment reversed. There really is no inconsistency. While these respondents urged in the trial court that there was no basis for the plaintiffs' or the Government's charges of discrimination, while these respondents urged in the trial court that there was no practical need for a judgment ordering the submission of a plan for integration, these respondents, nevertheless, after judgment, determined to submit their Plan for Integration in accordance with the terms of that judgment rather than leave the issues in limbo for yet another year.

The judgment was entered in January, 1970. Respondents' Plan for Integration was approved by the trial court on March 4, 1970.[1] That judgment and that plan called for implementation by the commencement of the school year in September, 1970, and there has been no deviation by these respondents from their announced goal of implementing the Plan for Integration in September, 1970. Action continues unabated to reassign school children in order to insure that no school within the District contains a majority of any minority racial group.

Petitioners have never claimed, either in the courts below or in their present petition, that respondents' decision not to appeal was made in bad faith or by malfeasance.

(See: *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 698 (1961);

Blocker v. Board of Education of Manhasset, New York, E.D.N.Y., 229 F. Supp. 714 (1964).)

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[1]The District Court offered these petitioners an opportunity to participate in the hearing upon the Plan for Integration. The offer was rejected. [Clk. Tr. p. 226.]

Furthermore, petitioners do not now and never have questioned the fact that permitting them intervention would create turmoil and confusion within the Pasadena community and upset the smooth administration of the District's schools. The trial judge, in denying intervention so found, so saying:

> ". . . The defendant Pasadena City Board of Education, standing here in opposition to this motion, would be severely prejudiced by the granting of the motion." [Clk. Tr. pp. 227-228.]

The Court of Appeals was similarly impressed. It stated:

> ". . . Before us the board opposes appellants in their effort to intervene. It wishes to be free forthwith to put its plan into operation and argues persuasively that intervention and a prolongation of this suit will cause confusion and turmoil within the school district and be disruptive of their plan." (Appendix A to Petition, p. 5.)

Surely, the granting of certiorari by this Court after the 1970 school year commences would intensify the confusion, turmoil and uncertainty with which the District Court and the Court of Appeals were concerned. The passage of time and the leadership by the Board of Education have produced a smoothing of the way toward reduction of the racial imbalance of students. That will all be lost by the granting of the Writ. The uncertainty will cause the stirring of passions within the community and encouragement to those who dissent.[2]

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[2]The public statement by President Nixon on March 24, 1970 is particularly appropriate. He said: "Where desegregation proceeds under the mandate of law the best results require that the plans be carefully adapted to local circumstances . . . In

Petitioners have attempted to bring themselves closer to *Smuck* by reference to a recall election which is now planned to take place in the Fall of 1970. Three members of the Board of Education (respondents) will be subject to a determination by the voters as to whether they shall continue in office. This special election, regardless of its outcome, does not alter the present status and character of the Board of Education nor does it affect in any way the judgment of the District Court and the approved Plan for Integration. Indeed, the right to recall members of the Board of Education dramatizes the difference between this case and *Smuck*. Here, the members of the Board of Education always have been responsive to the will of the electorate. The electorate, consequently, has the final voice in the policy and program of the District. In *Smuck*, that was not so when the decision was made by that appointed board not to appeal.

The Court of Appeals recognized that the Board of Education always has the right to seek a modification or change in its Plan for Integration if it feels that circumstances warrant a change. (Appendix A to Petition, p. 5.) The District Court's judgment provided for continuing jurisdiction and, therefore, leaves open to the present Board or any future Board the right to return to the District Court to seek approval of modifications to the Plan for Integration. [Clk. Tr. p. 60.]

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those communities facing desegregation orders, the leaders of the communities will be encouraged to lead—not in defiance, but in smoothing the way of compliance."

2. The Decision by the Ninth Circuit Does Not Conflict With Any Decision of This Court.

Petitioners grasp for *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129 (1967), and the broad language contained in its majority opinion.[3]

In *Cascade,* this Court was confronted with an order of divestiture which had been frustrated by the Department of Justice and the defendants. This Court held that the State of California and Southern California Edison Company should be permitted to intervene under Rule 24(a) because they had an economic interest in the competitive system which would be "adversely affected" by the settlement. This court was concerned whether the provisions of its order of divestiture had been followed in good faith. Viewed in the setting of those unusual circumstances, and expanded interpretation of Rule 24(a) was proper to permit those who would be directly and economically affected by the settlement to be heard.

Cascade did not purport to expand the phrase "adversely affected" to include every consumer, every stockholder, every creditor, or every citizen who might be remotely affected by a determination made involving

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[3]Lower courts have recognized that *Cascade* should not be read as a carte blanche for intervention by anyone at anytime.

Smuck v. Hobson (D.C. Cir.) 408 F. 2d 175 (1969);
Hobson v. Hansen (D.C.D.C. 1968) 44 F.R.D. 18;
Honda v. Clark (D.C.D.C. 1968) 303 F. Supp. 213;

See also:

Shapiro, Some Thoughts On Intervention Before Courts, Agencies and Arbitrators; 81 Harv. L. Rev. 721, 757-759; Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure; (I) 81 Harv. L. Rev. 356, 400-407.

his supplier, his corporation, his debtor or his community or school district. Rather, *Cascade* recognized that the 1966 amendment to Rule 24 amplified pre-existing federal practice regarding intervention, but this Court, at the same time, recognized that there was a limit to the elasticity and that it is not always easy to "draw the line". (386 U.S. 129, at 134.)

This Court, in *Cascade,* was concerned with the enforcement of the Clayton Act while at the same time providing a safeguard to the private interests by giving them a voice in the enforcement process. Here, such is not the case. Here, the Pasadena School Board is not precluded from carrying out its Plan for Integration. The effect of the judgment is not to limit the School Board in what it now plans to do. The School Board, having decided to comply with the judgment and having adopted its Plan for Integration is not acting contrary to any statutory or constitutional interests of any group. What the petitioners seek to accomplish by intervention, therefore, is not to prevent the School Board from doing something unconstitutional; rather, it is to obtain a judicial determination that the School Board is not required to do for constitutional reasons that which it wants to do. Stated more bluntly, the School Board, with or without the judgment, has embarked upon a program for the integration of its schools commencing September, 1970. While that program may provide for more racial balance of students than some constitutional authorities say that it needs to provide, and while that program may provide for more racial balance of the School District than the District Court ordered, the objection by petitioners is not a constitutional objection; the interest which petitioners may

have would be unaffected by a modification of the District Court judgment or even a complete reversal of it.

Cascade is not controlling here and the opinion by the Ninth Circuit is not in conflict with *Cascade* because, unlike *Cascade,* the School Board here has the right to do what it now proposes to do, namely, integrate the Pasadena Schools. In *Cascade,* the intervenors had an interest because the Government and the other parties of the litigation had no right to make a settlement that ran afoul of Section 7 of the Clayton Act.

This Court, in a *per curiam* decision in *Lupton Mfg. Co. v. United States,* 388 U.S. 457 (1967) dismissed an appeal from a denial of intervention in a case involving an antitrust consent decree. The Ninth Circuit correctly interpreted the *Lupton* decision as demonstrating the very limited application of *Cascade.*

Conclusion.

Throughout the trial in the District Court, these respondents took the emphatic position that they had been, were then, and would continue to take effective and prompt steps to provide for complete integration of the Pasadena Schools to overcome the racial imbalance which had resulted from assigning children primarily to schools in the neighborhoods in which they live. The determination not to appeal from the District Court judgment was a determination consistent with respondents' previously announced attitude and objectives. Submission of the Plan for Integration within thirty days after the entry of judgment demonstrated respondents' desire to promptly proceed toward full integration. To now permit petitioners to intervene will

not postpone the step being taken toward establishing better racial balance. The most petitioners can gain from a granting of the Writ is confusion and disillusionment of many within the Pasadena community.

Both the factual reasons and for the legal reasons the Petition should be denied.

August 19, 1970.

Respectfully submitted,

JOHN P. POLLOCK,

Counsel for Respondents Pasadena City Board of Education, et al.